Saul Hamid bin Pakir Mohamad v Inspector Abdul Fatah bin Abdul Rahman & Anor

HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 22–106 OF 1990
ZALEHA ZAHARI J
24 AUGUST 1999

Criminal Procedure *— Arrest — Right to counsel — Arrested person denied access to counsel whilst under remand — Whether police entitled to deny plaintiff access to counsel pending further investigations*

Criminal Procedure *— Arrest — Scope of police's power to arrest — Duty of police to promote public interest — 'Reasonable suspicion', definition of — Court to distinguish between 'reasonable suspicion' and 'prima facie proof'*

Civil Procedure *— Wrongful arrest — Assessment of damages — Plaintiff's failure to lead evidence or produce documents to determine quantum of damages — Whether such failure fatal to plaintiff's case*

Criminal Procedure *— Revision — Remand proceedings — Remand order revised by High Court in plaintiff's favour — Remand order acted on by police officer — Whether civil action would lie against police officer — Whether police officer accorded immunity — Police Act 1967 s 32(1)*

Tort *— Malicious prosecution — Reasonable and probable cause for prosecution — Decision to prosecute plaintiff made bona fide in honest belief and full conviction of plaintiff's guilt — Whether plaintiff's allegation of malicious prosecution proven*

The plaintiff was at all material times a technician with the Penang Botanical Gardens. The plaintiff was arrested on 21 March 1987 by the first defendant and was subsequently detained and placed under remand pending investigations for nine days from 21 March 1987 to 29 March 1987. The plaintiff claimed inter alia that: (i) his arrest was unlawful; (ii) his subsequent detention was unlawful; (iii) the first defendant had neglected and/or failed to investigate into police report No 6242/87 lodged by him on 21 March 1987; (iv) the institution of criminal proceedings against him for robbery and assault were unwarranted; and (v) he was denied access to counsel during the period of remand. The defendants however contended, inter alia, that: (a) they had received credible information that the plaintiff had been concerned with two seizable offences on 21 March 1987, ie and as such they were empowered and authorized to arrest the plaintiff; (b) the arrest effected on the plaintiff was therefore lawful, valid and of full legal effect; (c) the subsequent detention upon arrest and remand for nine days was pursuant to an express power conferred by law and pursuant to an order issued by a judicial officer and, in such a situation, the defendants could not be held liable to the plaintiff for false imprisonment; (d) the institution of criminal charges against the plaintiff for robbery and assault were valid and of full legal effect as it was instituted in the bona fide believe that the plaintiff did commit all of the acts alleged against him.

Held, dismissing the plaintiff's claim:

(1) The power of the police to arrest is governed by written law and is as prescribed by s 23(i) of the Criminal Procedure Code (FMS Cap 6) ('the CPC'). There is inevitably the potentiality of conflict between the public interest in preserving the liberty of the individual and the public interest in the detection of crime and the bringing to justice of those who commit it. The police is charged with the duty of taking the first steps to promote the public interest by inquiring into suspected offences with a view to identifying the perpetrators of them and of obtaining sufficient evidence admissible in a court of law against the person they suspect to be the perpetrator, as would justify charging them with the relevant offence before a court with a view to a trial for it (see p 811A–D).

(2) In deciding whether there exists 'reasonable suspicion', account is to be taken of the circumstances as they appeared at the time of the arrest and detention. The court is concerned to discover whether the authorities acted in bad faith or whether the arrest or detention is an arbitrary act and whether the law was correctly applied and interpreted. The court has to keep foremost in its mind the distinction between 'reasonable suspicion' and 'prima facie proof'. 'Prima facie proof' consists of admissible evidence whilst 'suspicion' can take into account matters that may not be put in evidence at all (see p 811E–F). On the facts, the police had not acted arbitrarily and had not abused their statutory power of arrest by arresting the plaintiff on 21 March 1987. On the facts and information before the first defendant then, he was right in concluding that there was reason to believe that the plaintiff had been concerned with two seizable offences (see p 817D–F).

(3) There were two remand orders in this case. The first remand order was granted by the magistrate for a period of two days from 23 March 1987 to 25 March 1987. The second remand order was granted by the sessions court president on 25 March 1987 but revised by the High Court in the plaintiff's favour in respect of representation by counsel in remand proceedings (see p 809B–H). Notwithstanding this revision, it did not follow that an action would lie against the police officer who acted on the order of remand made by the sessions court president for two reasons. Firstly, the sessions court president is immune from civil proceedings by reason of s 107(1) of the Subordinate Courts Act 1948 and secondly, the police officer was accorded immunity by virtue of s 32(1) of the Police Act 1967 (see pp 819I–820D).

(4) The plaintiff had to show on a balance of probabilities, in fact and in law, that the police were in breach and/or negligent in carrying out their statutory duty to investigate. However, in the light of all the actions taken by the police, the plaintiff's contention that the first defendant had failed and/or neglected to carry out his statutory duty to investigate was unwarranted and unsubstantiated (see pp 820F–G, 821B–C).

(5) The decision to prosecute the plaintiff made by the DPP, upon perusal of the investigation papers submitted to him by the police, was made bona fide in the honest belief and full conviction of the guilt of the plaintiff. Applying the objective test, an ordinary and prudent man would come to the same conclusion (see p 822F–G). The plaintiff's allegation of malicious prosecution was therefore not proven. On the facts, there was reasonable and probable cause for instituting the proceedings and prosecuting the plaintiff as there was good reason to believe that the plaintiff had committed the acts alleged against him (see p 823B–C).

(6) The Federal Constitution does not prescribe the time within which an arrested person shall be allowed to consult counsel. On the facts of the case, the police were entitled to deny the plaintiff access to his counsel pending further investigations. Such a denial of access during the period when he was under remand pending investigations does not amount to an infringement of the right to access to counsel conferred by the Constitution (see pp 821D, 822C).

(7) The plaintiff claimed to have suffered 'mental distress, humiliation, and injury' and 'loss of promotion opportunities' arising from the criminal charges preferred against him. However, the plaintiff had not given any particulars, neither was any evidence led nor any document produced in support of his claim as to damages. There was also no agreement between the parties that the issue of quantum be assessed subsequently upon the court's decision on liability. The failure on the part of the plaintiff to lead evidence or produce documents to determine the quantum allegedly due to him was therefore fatal to his case (see pp 823I–824B).

[Bahasa Malaysia summary

Plaintif pada semua masa material merupakan seorang juruteknik dengan Taman Botani Pulau Pinang. Plaintif telah ditangkap pada 21 Mac 1987 oleh defendan pertama dan kemudiannya ditahan dan diletakkan di bawah reman sementara menunggu siasatan selama sembilan hari daripada 21 Mac 1987 hingga 29 Mac 1987. Plaintif menuntut antara lain bahawa: (i) tangkapan beliau adalah menyalahi undang-undang; (ii) tahanan beliau yang berikutnya adalah menyalahi undang-undang; (iii) defendan pertama telah cuai dan/atau gagal untuk menyiasat laporan polis No 6242/87 yang dibuat oleh beliau pada 21 Mac 1987; (iv) pemulaan prosiding jenayah terhadap beliau kerana rompakan dan serangan adalah tidak wajar; dan (v) beliau tidak diberikan peluang mendapatkan seorang peguam di dalam tempoh reman. Namun defendan-defendan menegaskan antara lain bahawa: (a) mereka telah menerima maklumat yang boleh dipercayai bahawa plaintif telah dikaitkan dengan dua kesalahan boleh tangkap pada 21 Mac 1987, dan oleh demikian mereka telah diberi

kuasa untuk menangkap plaintif; (b) oleh yang demikian tangkapan yang dikuatkuasakan ke atas plaintif adalah sah dan menurut undang-undang sepenuhnya; (c) tahanan yang berikutan tangkapan dan reman selama sembilan hari adalah menurut kuasa nyata yang diberikan oleh undang-undang dan menurut perintah yang telah dikeluarkan oleh seorang pegawai kehakiman dan di dalam keadaan sebegini defendan-defendan tidak boleh dipertanggungjawabkan kepada plaintif untuk penahanan salah; (d) pemulaan tuduhan jenayah terhadap plaintif kerana rompakan dan serangan adalah sah dan menurut undang-undang kerana ia telah dimulakan di dalam kepercayaan bona fide bahawa plaintif memang melakukan kesemua perbuatan yang dikatakan terhadap beliau.

Diputuskan, menolak tuntutan plaintif:

(1) Kuasa polis untuk membuat tangkapan adalah dikawal oleh undang-undang bertulis dan sepertimana yang dinyatakan oleh s 23(i) KPJ. Tidak boleh dielakkan potensi konflik antara kepentingan awam di dalam mengekalkan hak kebebasan seorang individu dan kepentingan awam di dalam pengesanan jenayah dan membawa ke muka keadilan bagi mereka yang telah melakukannya. Polis dipertanggungjawabkan dengan tugas untuk mengambil langkah pertama meningkatkan kepentingan awam dengan menyiasat kesalahan-kesalahan yang disyaki dengan tujuan untuk mengenalpasti mereka yang melakukannya dan memperoleh keterangan yang mencukupi yang boleh terima di mahkamah undang-undang terhadap seseorang yang disyaki oleh mereka sebagai pelaku tersebut, bagi menjustifikasikan tuduhan terhadap mereka dengan kesalahan yang berkaitan di hadapan mahkamah dengan tujuan untuk mengadakan perbicaraan mengenainya (lihat ms 811A–D).

(2) Di dalam memutuskan sama ada wujud keterangan 'syak yang munasabah' pertimbangan harus diberikan berdasarkan keadaan-keadaan sebagaimana ia timbul ketika waktu tangkapan dan tahanan tersebut. Mahkamah mengambil berat untuk mendapat tahu sama ada pihak berkuasa telah bertindak dengan niat jahat atau sama ada tangkapan atau tahanan itu suatu tindakan arbitrari dan sama ada undang-undang telah dipakai dan ditafsirkan dengan betul. Mahkamah terutama sekali mesti mementingkan perbezaan antara 'syak yang munasabah' dan 'bukti prima facie'. 'Bukti prima facie' mengandungi keterangan boleh terima sementara 'syak' boleh mengambil kira perkara-perkara yang mungkin tidak diambil sebagai keterangan sama sekali (lihat ms 811E–F). Berdasarkan fakta-fakta itu polis telah tidak bertindak arbitrari dan telah menyalahgunakan kuasa statutori tangkapan mereka dengan menangkap plaintif pada 21 Mac 1987. Berdasarkan fakta-fakta dan maklumat yang dikemukakan oleh defendan pertama itu, beliau betul di dalam memutuskan

bahawa wujud sebab untuk mempercayai bahawa plaintif adalah berkaitan dengan kesalahan-kesalahan boleh tangkap itu (lihat ms 817D–F). A

(3) Wujud dua perintah reman di dalam kes ini. Perintah reman yang pertama telah diberikan oleh majistret untuk tempoh dua hari bermula pada 23 Mac 1987 hingga 25 Mac 1987. Perintah reman yang kedua telah diberikan oleh presiden mahkamah sesyen pada 25 Mac 1987 tetapi dikaji semula oleh Mahkamah Tinggi yang berpihak kepada plaintif berhubung dengan representasi peguam di dalam prosiding reman itu (lihat ms 809B–H). Walaupun terdapat kajian semula ini, ia tidak semestinya bahawa satu tindakan akan timbul terhadap pegawai polis yang bertindak di atas perintah reman yang dibuat oleh presiden mahkamah sesyen oleh kerana dua sebab. Pertamanya, presiden mahkamah sesyen adalah kebal daripada prosiding sivil oleh sebab s 107(1) Akta Mahkamah Rendah 1948 dan keduanya, pegawai polis diberikan kekebalan itu menurut s 32(1) Akta Polis 1967 (lihat ms 819I–820D). B C D

(4) Plaintif perlu menunjukkan atas imbangan kebarangkalian, dari segi fakta dan undang-undang, bahawa polis telah melanggar dan/atau cuai di dalam menjalankan kewajipan statutori mereka untuk membuat siasatan. Namun begitu berdasarkan semua tindakan-tindakan yang telah diambil oleh polis, malahan plaintif bahawa defendan pertama telah gagal dan/atau mengabaikan kewajipan statutori beliau untuk membuat siasatan adalah tidak wajar dan tidak boleh disahkan (lihat ms 820F–G, 821B–C). E

(5) Keputusan untuk mendakwa plaintif yang dibuat oleh TPP, setelah melihat kertas-kertas siasatan yang dikemukakan kepadanya oleh polis, telah dibuat secara bona fide di dalam kepercayaan yang jujur dan keyakinan penuh akan kebersalahan plaintif. Dengan menggunakan ujian objektif, seorang biasa dan berhemat akan sampai kepada kesimpulan yang sama (lihat ms 822F–G). Dakwaan plaintif tentang pendakwaan niat-jahat oleh demikian tidak dibuktikan. Berdasarkan fakta-fakta terdapat sebab yang munasabah dan mungkin untuk memulakan prosiding itu dan mendakwa plaintif kerana wujud sebab yang baik untuk mempercayai bahawa plaintif telah melakukan kesalahan perbuatan-perbuatan yang didakwa terhadap beliau (lihat ms 823B–C). F G

(6) Perlembagaan Persekutuan tidak menyatakan tempoh masa di mana seorang yang ditangkap patut dibenarkan untuk berunding dengan seorang peguam. Berdasarkan fakta-fakta di dalam kes ini, polis berhak untuk menafikan plaintif peluang berjumpa dengan peguam beliau sementara menunggu siasatan selanjutnya. Satu penafian peluang ini di dalam tempoh beliau di bawah reman sementara menunggu siasatan tidak diambil kira sebagai satu pelanggaran hak kebebasan kepada seorang peguam yang telah diberikan oleh Perlembagaan (lihat ms 821D, 822C). H I

(7) Plaintif mendakwa telah mengalami 'penderitaan mental, perasaan malu, dan kerugian' dan 'kehilangan peluang kenaikan kerja' akibat daripada tuduhan jenayah yang dibuat terhadap beliau. Namun begitu plaintif tidak memberi apa-apa maklumat, maupun ada apa-apa keterangan yang memberi petunjuk ataupun apa-apa dokumen yang dikemukakan bagi menyokong tuntutan beliau untuk ganti rugi. Juga tidak terdapat satu perjanjian antara pihak-pihak itu bahawa isu kuantum ditaksirkan sejurus selepas keputusan mahkamah tentang liabiliti. Kegagalan pihak plaintif untuk mengemukakan keterangan atau dokumen-dokumen untuk menentukan kuantum yang didakwa perlu dibayar kepada beliau oleh demikian membawa padah kepada kes beliau (lihat ms 823I–824B).]

Notes

For a case on reasonable and probable cause for prosecution, see 12 *Mallal's Digest* (4th Ed, 1996 Reissue) para 311.

For a case on revision of remand proceedings, see 5 *Mallal's Digest* (4th Ed, 1997 Reissue) para 2399.

For cases on right to counsel, see 5 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 530–536.

For cases on scope of police's power to arrest, see 5 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 537–538.

For cases on wrongful arrest generally, see 5 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 550–563.

Cases referred to

Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal [1995] 2 MLJ 770 (refd)

Bonham-Carter v Hyde Park Hotel Ltd [1948] WN 89 (refd)

Browne v Dunn (1893) 6 R 67 (refd)

Chong Fook Kam & Anor v Shaaban & Ors [1968] 2 MLJ 50 (refd)

Devaki Nair & Anor v Sum Kum [1964] MLJ 74 (refd)

Ooi Ah Phua v Officer-in-Charge Criminal Investigations, Kedah/Perlis [1975] 2 MLJ 198 (refd)

Saul Hamid v PP [1987] 2 MLJ 736 (refd)

Shaaban & Ors v Chong Fook Kam & Anor [1969] 2 MLJ 219 (refd)

Sivalingam a/l Periasamy v Periasamy & Anor [1995] 3 MLJ 395 (refd)

Tan Kay Teck & Anor v The A-G [1957] MLJ 237 (refd)

Tims v John Lewis & Co [1951] 2 KB 459 (refd)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) ss 23(i)(a), 28, 117

Federal Constitution arts 5(3), (4)

Penal Code ss 323, 392

Subordinate Courts Act 1948 s 107(1)

Gobind Singh Deo (Karpal Singh & Co) for the plaintiff.
Syed Marzidy bin Syed Marzuki (Federal Counsel) for the defendants.

Zaleha Zahari J: By this suit the plaintiff, Saul Hamid bin Pakir Mohamad, seeks to recover damages for wrongful arrest, wrongful detention and malicious prosecution. He grounds his claim on abuse of power, negligence and/or breach of statutory duty .

The defendants denies the plaintiff's claims and puts the plaintiff to strict proof thereof.

ISSUES FOR DETERMINATION

I propose to deal with the issues raised in this case the following chronological order:

(a) Whether on the facts of this case the police had authority to arrest the plaintiff ?

(b) Whether it was open for the plaintiff to raise the issue of not being informed of the grounds of his arrest by reason of the fact that this issue was not raised in his statement of claim; and should this court hold that the plaintiff could raise this as an issue, whether, on the facts of this case, the plaintiff had in fact been informed and had knowledge of the grounds of his arrest?

(c) Whether, on the facts of this case, the detention of the plaintiff was authorized by law?

(d) Whether, on the facts of this case, the police were in breach and/or negligent in the exercise of their statutory duty to investigate?

(e) Whether, on the facts of this case, there was an infringement of the plaintiff's constitutional right of access to counsel?

(f) Whether, on the facts of this case, the plaintiff had discharged the onus on him to prove that the institution of criminal proceedings against him was vitiated by malice?

(g) If the court were to rule on the issue of liability in the plaintiff's favour, what is the quantum of damages payable to the plaintiff?

BACKGROUND

The plaintiff is and was at all material times, a technician, attached to the Botanical Gardens, Penang whilst Insp Abdul Fatah bin Abdul Rahman, the first defendant, was at the material time, a police officer serving as an investigating officer at the Pulau Tikus Police Station, an employee of the Government of Malaysia, the second defendant, and as such employer, is vicariously liable for any wrongful act done or default committed by the first defendant in the performance of his public duties.

The plaintiff's contentions

It is common ground that the plaintiff in this case was arrested on 21 March 1987 by the first defendant and that he was subsequently detained and

A placed under remand pending investigations for a total period of nine days. The plaintiff claims his arrest and the period of detention, immediately upon arrest, as well as the period he was placed under remand pending investigations, to be unlawful.

The plaintiff's further contentions were:

B (a) That the first defendant had neglected and/or failed to investigate into police report Pulau Tikus No 642/87 (exh 'P13') lodged by him on 21 March 1987;

(b) That he was denied medical attention during the period he was under remand;

C (c) That the institution of criminal proceedings against him for robbery and assault were unwarranted;

(d) That he was denied access to his counsel during the nine-day period he was under detention pending investigations;

(e) That arising from the said arrest, detention and institution of criminal D proceedings, he had suffered mental distress, humiliation and injury, and that as a result thereof, he had lost his reputation, as well as suffered loss of promotion opportunities.

In the course of giving evidence in court the plaintiff made two additional allegations ie:

E (a) that he was not informed of the grounds of his arrest; and

(b) that he was assaulted by the police whilst in police custody.

In the circumstances as contended by him, the plaintiff claims that he is entitled to damages and other consequential orders.

F *The defendants' contentions*

In their statement of defence the defendants denies the plaintiff's claim and puts him to strict proof thereof. The defendants' case essentially are that:

(a) the police had received credible information that the plaintiff had been G concerned with two seizable offences, ie of robbery and assault on 21 March 1987, and in such circumstances, the police had power and authority to arrest the plaintiff;

(b) the arrest effected on the plaintiff was therefore lawful, valid and of full legal effect;

H (c) the subsequent detention upon arrest and remand pending investigations of the plaintiff for a total period of nine days from 21 March 1987 to 29 March 1987 was pursuant to an express power conferred by law and pursuant to an order issued by a judicial officer and in such a situation the defendants cannot therefore be held liable to the plaintiff for false imprisonment;

I (d) the question of denying the plaintiff medical attention did not arise as there was no evidence of the plaintiff sustaining any injury on that day in question and that the plaintiff did not request for medical attention;

(e) the institution of the criminal charges preferred against the plaintiff for robbery and assault were valid and of full legal effect as it was instituted in the bona fide believe that the plaintiff did in fact commit all of the acts alleged against him.

The defendants were of therefore of the view that the plaintiff had no cause of action against the defendants and prays that the plaintiff's claim be dismissed with costs.

Facts not in issue

Before dealing with the facts in issue, and the rival arguments advanced by both parties in respect of them, I would like at the outset to set out all facts which are not in issue by reason of them being expressly admitted in pleadings, alternatively, by reason of admission by the witnesses called by both parties in support of their respective case in their oral evidence in court, and are therefore deemed to be not in issue. The evidence referred to are principally that of the plaintiff himself, Sukah Singh (DW1), Sgt Zainal (DW3) as well as that of the first defendant (DW4). The facts which I find to have either been admitted, proved or established are as follows:

(a) that at about 1.00 pm on 21 March 1987 the police received two reports, the first, from DW1, Sukah Singh, (Police Report No 641/87, exh 'D7'), and the second, from the plaintiff (Police Report No 642/87, exh 'P13'), where each of the respective complainant alleged that they were the victim of the other's aggressive acts at the Penang Botanical Gardens on 21 March 1987 at about 10.30 am and at about 1.30 pm that same day (evidence of plaintiff, DW1, DW3, and first defendant);

(b) that the police (ie DW3, acting on the instructions of the first defendant) recorded the statements of both complainants, Sukah Singh as well as that of the plaintiff, that same day immediately after the two reports were lodged (evidence of the plaintiff, DW1, DW3, and the first defendant);

(c) that the first defendant also questioned Sukah Singh and the plaintiff that same afternoon on 21 March 1987 after their respective statement was recorded by DW3 (evidence of the plaintiff, DW1 and first defendant) and concluded that there was reason to believe that the plaintiff had committed two seizable offences of robbery and assault;

(d) that the first defendant then referred this case to his superior officer, Ketua Siasatan Jenayah, Leong Ho Chiew, who then authorised the first defendant to arrest the suspect, ie the plaintiff in this case (evidence of the plaintiff and the first defendant);

(e) that the first defendant arrested the plaintiff at about 3 pm on 21 March 1987 (evidence of the plaintiff and first defendant and exh 'D8');

(f) that the plaintiff was, immediately upon arrest, detained at the Pulau Tikus Police Station (evidence of the plaintiff and the first defendant);

(g) that the plaintiff was brought to the cawangan foto, police headquarters the following day on 22 March 1987 at about 10.30 am to be photographed (evidence of the plaintiff and first defendant);

(h) that at about 10.30 am on 23 March 1987 the plaintiff was produced by the first defendant before a magistrate, Magistrate's Court, George Town, where the first defendant applied for an order that the plaintiff be remanded for a period of seven days pending further investigations under s 117 of the Criminal Procedure Code ('the Code') (evidence of the plaintiff, the first defendant and DW3);

(i) that the magistrate did not grant the seven days applied for by the first defendant but only granted an order that the plaintiff be remanded for a period of two days pending investigations from 23 March 1987 to 25 March 1987 under s 117 of the Code (evidence of the plaintiff and the first defendant and exh 'D18');

(j) that the plaintiff was then brought to the police headquarters to be fingerprinted (evidence of the plaintiff and the first defendant);

(k) that on 24 March 1987 one Inspector Ng Boon Hin recorded a cautioned statement from the plaintiff (evidence of the plaintiff and the first defendant);

(l) that on the 25 March 1987 the first defendant produced the plaintiff before the President Sessions Court, Penang, at which proceedings the first defendant applied for an extension of the period of remand under s 117 of the Code for further police investigations (evidence of the plaintiff and the first defendant, exh 'D18');

(m) that there were some arguments at the remand proceedings on 25 March 1987 before the President Sessions Court whether the plaintif had a right to be represented by counsel and that the President Sessions Court ruled that the plaintiff did not have a right to be represented by counsel at that stage; thereafter, the learned President Sessions Court granted an extension of the period of remand of the plaintiff for a period of four days from 25 March 1987 to 29 March 1987 under s 117 of the Code (evidence of the plaintiff and the first defendant and exh 'D18');

(n) that the plaintiff, vide Penang High Court Criminal Revision No 53–8–87, then applied to the Judge, High Court, Penang to exercise his powers of criminal revision under s 323 of the Code, claiming that he had a right to be represented by counsel during remand proceedings for an order under s 117 of the Code alleging that the President Sessions Court had erred in denying him the right to be represented by counsel at the said remand proceedings;

(o) that on 25 March 1987, the plaintiff was again subjected to questioning by the first defendant (evidence of the plaintiff and the first defendant);

(p) that on 29 March 1987 the plaintiff was released by the police on bail (evidence of the plaintiff, PW2 and the first defendant);

(q) that on 8 April 1987 the plaintiff was charged for robbery and assault under ss 392 and 323 of the Penal Code; A

(r) that on 4 June 1987 the Honourable Justice Edgar Joseph Jr ruled in Criminal Revision No 53–8–87 that an arrested person had a right to be represented by Counsel during remand proceedings for an order under s 117 of the Code; B

(s) that on 19 March 1990 the plaintiff filed this writ of summons and statement of claim ie Penang High Court No 22–106–90 claiming damages for wrongful arrest and detention etc;

(t) that on 10 January 1992 the plaintiff was discharged not amounting to an acquittal in respect of the criminal charges preferred against him; C

(u) that on 3 January 1997 the plaintiff was recharged for robbery and assault under ss 392 and 323 of the Penal Code and at the end of the prosecution case his defence was called; and

(v) that on 26 May 1997 the plaintiff was acquitted and discharged in respect of the charges preferred against him.

The federal counsel in his submission had also raised as an issue the failure D on the part of the plaintiff s counsel to challenge and cross-examine the defendants' witness, Sukah Singh (DW1), in respect of his version of events at the Botanical Gardens on 21 March 1987. The federal counsel submitted that the failure on the part of the plaintiff's counsel to cross-examine and challenge DW1's evidence and to 'put' the plaintiff's version of events on the 21 March 1987 to DW1 must be construed by this court as an E acceptance and admission of the evidence of DW1's testimony.

The plaintiff's counsel concedes that he did not cross-examine DW1; that he had failed to challenge DW1's evidence by 'putting' the plaintiff's version of events to DW1. Be that as it may as a ruling on this issue of the failure by the plaintiff's counsel to cross-examine DW1 is tied up with the F assessment of credibility of witnesses and with the issue of making a considered decision as to the probabilities of the case, I intend to defer making a ruling on this issue to a later stage. For the moment the failure to cross-examine DW1's evidence is not being set out in this part of the judgment as an admission of the plaintiff of DW1's version as to what transpired on 21 March 1987. G

The court notes that the plaintiff has not deemed it necessary to bring DW1, the person who lodged the report against him, as a party to these proceedings but has deemed it fit to only name the investigating officer assigned to investigate into the reports lodged and the Government of Malaysia as defendants. I therefore propose to deal with the issues, H chronologically, in accordance with the sequence of events from the time the police first had knowledge of the incidents in issue, and thereafter, to events and actions taken leading to the plaintiff being charged.

LIABILITY

I

Whether the arrest of the plaintiff was lawful?

Firstly, the challenge as to the legality of the arrest of the plaintiff. It is not in issue that the first defendant arrested the plaintiff on the 21 March 1987

A at about 3.15 pm (exh 'D8', Report No 643/87, bundle C p 18). The issue for determination is whether the arrest effected is authorized by law.

I understand the legal position to be as follows: The power of the police to arrest is governed by written law and is as prescribed by s 23(i) of the Code which is in the following terms:

B (i) Any police officer ... may without warrant arrest:

(a) any person who has been concerned with any offence committed anywhere in Malaysia which is a seizable offence under any law in force in that part of Malaysia in which it was committed or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his being so concerned; ... .

C

There is inevitably the potentiality of conflict between the public interest in preserving the liberty of the individual and the public interest in the detection of crime and the bringing to justice of those who commit it. The police is charged with the duty of taking the first step to promote the latter D public interest by inquiring into suspected offences with a view to identifying the perpetrators of them and of obtaining sufficient evidence admissible in a court of law against the person they suspect to be the perpetrator as would justify charging them with the relevant offence before a court with a view to a trial for it.

E It has been authoritatively held that in deciding this issue whether there existed 'reasonable suspicion', account is taken of the circumstances as they appeared at the time of the arrest and detention. The court is concerned to discover whether the authorities acted in bad faith or whether the arrest or detention is an arbitrary act and whether the law was correctly applied and interpreted.

F In determining this issue the court has to keep foremost in its mind the distinction between 'reasonable suspicion' and 'prima facie proof'. That 'prima facie' proof consists of admissible evidence whilst 'suspicion' can take into account matters that could not be put in evidence at all.

In the Privy Council case of *Shaaban & Ors v Chong Fook Kam & Anor* G [1969] 2 MLJ 219, Lord Devlin held that the test to be applied in the exercise of the power under s 23(i)(a) of the Code is the 'reasonable suspicion' test. At p 221 His Lordship held that:

> Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: 'I suspect but I cannot prove'. Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is H the end. When such proof has been obtained the police case is complete; it is ready for trial and passes on to its next stage. It is indeed desirable as a general rule that an arrest should not be made until the case is completed. But if arrest before that is forbidden, it could seriously hamper the police. To give power to arrest on reasonable suspicion does not mean that it is always or even ordinarily to be exercised. It means that there is an executive discretion.
>
> I In the exercise of it many factors have to be considered besides the strength of the case. The possibility of escape, the prevention of further crime and the obstruction of police enquiries are examples of those factors with which all judges who have had to grant or refuse bail are familiar.

> There is no serious danger in a large measure of executive discretion in the first instance because in countries where common law principles apply the discretion is subject indirectly to judicial control. There is first the power to grant bail. There is secondly the fact that in such countries there is available only a limited period between the time of arrest and the institution of proceedings; and if a police institutes proceedings without prima facie proof, he will run the risk for malicious prosecution. The ordinary effect of this is that a police officer either has something substantially more than reasonable suspicion before he arrests or that, if he has not, he has to act promptly to verify it. In Malaysia the period available is strictly controlled by the Code. Under s 28 the suspect must be taken before a magistrate at the latest within 24 hours. If the investigation cannot be completed within 24 hours and there are grounds for believing that the accusation or information is well founded, under s 117 the magistrate may order the detention of the accused for a further period not exceeding 15 days in the whole. By allowing 15 days after arrest for investigation, the Code shows clearly that it does not contemplate prima facie proof as a prerequisite for arrest.
>
> ...
>
> There is another distinction between reasonable suspicion and prima facie proof. Prima facie proof consists of admissible evidence. Suspicion can take account matters that could not be put in evidence at all.

Counsel for the plaintiff and the senior federal counsel, in their submissions before me, were in agreement that in determining whether a complaint is reasonable, an objective test and not a subjective test should be applied (*Tims v John Lewis & Co* [1951] 2 KB 459 at p 472 as applied in *Tan Kay Teck & Anor v The A-G* [1957] MLJ 237). The principle laid down in this case is not what, on the evidence known to the prosecutor, but what, as a reasonable person, he ought, in the view of the court, to have thought. In the words of Lord Goddard in *Tims v John Lewis*:

> The question whether there was a reasonable or probable cause is not, I think, to be determined subjectively as has been suggested. It is a question which objectively the Court has to decide on the evidence before it.

As to the meaning to be ascribed to the phrase 'reasonable suspicion exists of his having been so concerned' in s 23(i)(a), this has been held to mean a bona fide belief on the part of the police officer that an offence has been committed.

It is therefore now incumbent on this court to apply the above principles, to apply the objective test to the evidence presented before the court, and then decide what the police ought to have thought. Thereafter, to then decide whether the police were, on the facts of this case, right in concluding that a reasonable suspicion exists that the plaintiff had been concerned with two offences of robbery and assault warranting them to invoke their statutory power of arrest under s 23(i)(a) of the Code.

The starting point to determine this issue must necessarily be the lodgment of the reports by DW1 on the one hand, and the plaintiff, on the other.

Police Reports No 641/87 and 642/87

It is common ground that the police had, on 21 March 1987, received two diagrammatically conflicting reports of the two incidents that occurred at the Botanical Gardens at about 10 am, and at about noon, on 21 March 1987. In such a situation it was therefore incumbent upon the police to consider the probabilities of the case. They have to consider which of the two complainant is the more credible. On the facts of this case, to consider whether Sukah Singh's version of events was the more probable as contrasted with that of the plaintiff's version of events.

The police received Sukah Singh's report first. It was lodged at about 1.05 pm 21 March 1987. DW1 was then a thirteen year old schoolboy. According to the report lodged, Pulau Tikus Police Report No 641/87 (exh 'D7', Bundle C p 11), DW1 complained that earlier on that morning, at about 10 am, as he was selling peanuts at the Botanical Gardens, a man whom he recognizes and knows by the name of 'Hamid', ie the plaintiff, who was then riding a bicycle, suddenly knocked into him from the rear causing him to fall. According to DW1 the plaintiff then assaulted him, directed him to empty his pockets. He obeyed and emptied his pockets after which the plaintiff grabbed the monies which he held out in his hand amounting to RM14 in all.

The next report lodged at the Pulau Tikus Police Station was Report No 642/87 (exh '3', Bundle B p 10), ie that lodged by the plaintiff. The plaintiff was then aged thirty-three, working as an agricultural assistant at the Penang Botanical Gardens, ie where the incident took place. The full report lodged by the plaintiff is reproduced and reads as follows:

> Pada 21 Mac 1987, jam lebih kurang 10.30 pagi saya balik ke pejabat selepas minum pagi, semasa hendak balik ke pejabat seorang budak bangsa Sikh dan seorang budak India menghalang saya dari pergi bekerja. Budak lelaki Sikh ini berugut dan maki bahwa awak tidak boleh datang kerja disini. Saya pun balik ke pejabat dan jam lebih kurang 12.40 petang saya menunggang basikal saya dan hendak balik ke rumah. Semasa perjalanan saya menuju ke pintu masuk Kebun Bunga, saya dapati bahawa seorang budak Sikh menutupnya dan terus lari dan dua orang abangnya turut menutup pintu masuk kecil Kebun Bunga semasa saya keluar, saya tidak dapat dielakkan dan dikenakan basikal saya dan mudguard pun bengkok. Saya pun jatuh, dan tiga orang adik-beradik mengepung saya dan memukul, tendang diseluruh anggota badan saya. Semasa itu juga Penguasa Jabatan Kebun Bunga datang dan menyuruh saya membuat suatu repot. Saya pun balik ke rumah dengan menolak basikal saya. Semasa saya balik k erumah salah seorang menunjukkan sebilah pisau 'nanti awak jaga awak tidak boleh datang ke kerja di pejabat Kebun Bunga, Pulau Pinang.

From the actions taken by the police it would appear that the police accepted DW1's story rather than the plaintiff's story. The reasons given by the first defendant in his evidence in court as to why, in making a considered decision as to which of the two versions to accept, and after consulting his superior officer, the police preferred to believe DW1 and not the plaintiff, are as follows:

(i) the age of the two complainants, Sukah Singh, who was then a thirteen year old child, as contrasted with the plaintiff, a 33 year old adult; A

(ii) the size of the respective complainants ie Sukah Singh who was only four feet tall, thin and small-built, as contrasted with the plaintiff who was tall, burly and more heavily built;

(iii) the fact that Sukah Singh was only a schoolboy compared with the plaintiff who was working and had some authority over the area where the incidents took place; B

(iv) the demeanour of the two complainants immediately after they lodged their respective police report; in the case of DW1, who appeared frightened and in tears, as contrasted with the plaintiff who was angry and, according to the police, totally uncooperative; C

(v) the fact that there were no visible appearance of any injury on the plaintiff on the day the report was lodged and statement recorded.

The plaintiff's evidence D

The plaintiff in his oral testimony testified that he had lodged several police reports over the past seven years in which he alleged that he had been the subject of harassment and threats on numerous occasions by diverse persons over the years prior to this incident of 21 March 1987. These reports of the plaintiff had been tendered and marked as exhibits during examination-in-chief as well as during cross-examination. E

Some general comments on these earlier reports of the plaintiff may be in order. First and foremost the court notes that none of them implicate DW1. Be that as it may, I am of the view that these earlier reports has some probative value in this case to show the nature and character of the plaintiff.

The court observes that in 1980 the plaintiff lodged three police reports. In the earliest report, ie Report No 291/80 (exh 'P1'), the plaintiff's complaint was that on 3 February 1980 a group of Indian Muslim had thrown stones at the shop where he was then working. Towards the end of 1980 two other police reports were lodged, one in the month of November, and another in the month of December. In Report No 2885/80 (exh 'D9') the plaintiff alleged that at about 1.45 pm on 10 November 1980 some Indian boys threatened him and his father at the shop where he was then working, whilst in Report No 3225/80 (exh 'D13') his complaint was that, at about 7.55 pm on 13 December 1980, five Indian boys whom he named, and another, whom he could recognize, whilst in a bus, stoned the shop where he worked. F G H

There was a break of about 2 years before the next report ie Exh 'P2', Report No 291/83. According to this fourth report the plaintiff's complaint was that on 1 February 1983, at about 6.10 pm, upon alighting from a bus, five Indian boys rushed towards him, then kicked and assaulted him.

Two reports lodged in April 1984, ie Report No 768/84 (Exh 'D15') by Constable Zulkiflie Bin Yahya (Constable 102843), and Report No 770/84 (exh 'D10") lodged by the plaintiff, were also produced. Exhibit 'D15' is a report lodged by the said constable alleging that a restaurant owner had I

obstructed him from carrying out his official duty and of preventing him from removing his motorcycle which, according to the Constable, was brought into the restaurant where the person whom he was giving chase had sought sanctuary. On the other hand, the plaintif, on that same date, lodged a police report, ie exh 'D10', alleging Constable 102843 (the complainant in exh 'D15') had rode his motorcycle into his restaurant thereby injuring a woman who was eating at the shop and also knocking into two chairs.

As to the other reports lodged by the plaintiff they are essentially along the same vein as the ones referred to above, either of his shop being stoned, of him being harassed, assaulted and/or of being shown obscene signs.

Reverting back to the plaintiff's evidence, in recalling the events prior to the incident of the 21 March 1987, the plaintiff testified that in the month of March 1987, peanut vendors at the Botanical Gardens were considered a nuisance, and according to him, created problems to his department. The plaintiff in his testimony considered these peanut vendors as 'trespassers' and 'hooligans'. According to him the activities and conduct of the peanut vendors in the Botanical Gardens had affected the image and good name of the said place.

As to the incidents in issue in this case the plaintiff testified that in the morning of the 21 March 1987, whilst he was at his workplace, he saw DW1 in the company of another Indian boy. They were then selling peanuts. According to him these two boys then obstructed him, swore at him and threatened him. In the words of the plaintiff:

> Mereka penceroboh yang menjual kacang putih dan menjalankan aktiviti yang tak senonoh seperti perasugut, harass dan abuse pelancung dan orang-orang tempatan.

Pausing here for a moment, it would appear that the plaintiff would like the court to believe that although he was a person of some authority over the area (as contrasted with DW1 and DW2 who had none) when confronted by the alleged behavior by these two boys vending peanuts, that the plaintiff was totally helpless. That he would like this court to believe, when confronted with the alleged acts of obstruction, that he did not react, that he did nothing but meekly went to work as usual.

As to the noon incident, the plaintiff alleged he was again obstructed and assaulted, this time at the main gate of the Botanical Gardens, by DW1 and two of DW1's brothers, Manjit Singh and Pajan Singh.

Sukah Singh's evidence

DW1 essentially repeated his earlier story to the police. As to how the plaintiff knocked him from the rear with his bicycle when he was selling peanuts at about 10.30 am on 21 March 1987 together with his friend, Kandiah Chandrasegran, at the Botanical Gardens. That the plaintiff then slapped him, kicked him, pulled off his turban, then warned them not to sell peanuts at the Botanical Gardens, after which he was directed to empty his pocket. According to DW1, the plaintiff then grabbed the money which he held in his hand and then ordered both him and his friend, to leave the place.

As to the noon incident DW1 testified that at about 12.30 pm that same day at the main gate of the Botanical Gardens, he was again assaulted by the plaintiff; that the plaintiff slapped him, chased him out of the area, warned him not to hawk peanuts at the Botanical Gardens and also warned him not to look into the plaintiff's shop. DW1 then ran home crying after which he, accompanied by his brother, then lodged report Exh 'D7'. A

Sukah Singh emphatically denied the suggestion put to him that he had obstructed the plaintiff, nor to swearing or to harassing at him, at the material times in question. B

This may be an appropriate stage to deal with the issue raised by the Federal Counsel of the failure on the part of the plaintiff's counsel to challenge and cross-examine DW1 and DW2's testimony in court in relation to the incidents on 21 March 1987. C

The court's attention was drawn to the case of *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395 at p 400 in support of the proposition that failure to cross-examine and challenge DW1 and DW2's evidence in court as to the 21 March 1987 incident must be considered by this court as an acceptance of DW1 and DW2's version of the events in question. In *Sivalingam*'s case the Court of Appeal referred to the case of *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770 at p 774 in applying the rule in *Browne v Dunn* (1893) 6 R 67 which held that: D

> It is essential that a party's case be expressly put to his opponent's material witnesses when they are under cross-examination. A failure in this respect may be treated as an abandonment of the pleaded case and if a party, in the absence of valid reasons, refrains from doing so, then he may be barred from raising it in argument. It is quite wrong to think that this rule is confined to the trial of criminal cases. It applies with equal force in the trial of civil cases as well. E F

En Gobind, the plaintiff's counsel, brushed aside this point of failure to cross-examine DW1 and DW2 summarily. He considered it to be immaterial and a non issue.

My view on the plaintiff's failure to cross-examine is this. I am of the view that counsel for the plaintiff is bound to put to each of his opponent's witnesses in turn so much of his own case as concerns that particular witness or in which that witness had any share, and as he has failed to give good reason for his failure to do so, must be construed by this court as an acceptance of DW1 and DW2's version of the events on 21 March 1987. G

Further, from the plaintiff's demeanor when testifying in court, he does not strike me to be a person who is timid, helpless and who can be easily intimidated. He holds himself out very confidently and strikes me to be a very intense person. If all the numerous police reports lodged by the plaintiff over the years is to be taken into consideration he certainly is no novice but has a lot of experience in lodging police reports! H

The fact that the plaintiff is not a person who can be easily scared or intimidated can be discerned from the plaintiff's testimony itself eg when he lodged his report he was practically dictating to the police what they should I

A do and should not do. When produced before a judicial officer at the s 117 remand proceedings he also appears to be quite vocal and able to express himself and state his case.

Were the police right in concluding that a reasonable suspicion exists that the plaintiff had been concerned with two seizable offence? I have
B appraised all of the evidence very carefully in considering the probabilities of the case.

I hold that upon a proper assessment of the totality of the evidence the plaintiff's story to be highly improbable. It is my finding that DW1 is the more truthful witness. From the plaintiff's own testimony, the presence of peanut vendors at the Botanical Gardens was clearly unwelcome. To the
C plaintiff they were trespassers. He considered them a nuisance. Not only that he referred to them as hooligans.

In the light of this strong emotion which the plaintiff had towards peanut vendors generally I am of the view that it is more probable that it was the plaintiff, upon seeing DW1 and DW2 vending peanuts at the Gardens,
D to be the aggressor and not vice versa.

It is also my finding that the police had not acted arbitrarily and had not abused their statutory power of arrest by arresting the plaintiff on 21 March 1987. I am of the view that the first defendant was right in taking all of the factors related by him into consideration in making a considered decision as
E to whose version to accept ie as to age, size of the plaintiff and DW1 etc in deciding whether there was a reasonable suspicion of the plaintiff being concerned in two offences of robbery and assault contrary to ss 392 and 323 of the Penal Code.

The result of these conclusions is that the claim for wrongful arrest fails. I hold, based on the facts and information before the first defendant then,
F he was right in concluding that there was reason to believe that the plaintiff had been concerned with two seizable offences. The arrest of the plaintiff by the first defendant on 21 March 1987 is accordingly valid and of full legal effect. According to the law, subsequent to the arrest, the police has the power to detain the plaintiff for a period not exceeding 24 hours.

G Before I consider the next issue of the loss of liberty of the plaintiff for a period of nine days pending investigations I would like at this stage to deal with the allegation raised for the first time in the plaintiff's oral testimony in court of not being informed of the grounds of his arrest.

H *Whether the plaintiff was informed of the grounds of his arrest?*

Article 5(3) of the Constitution provides that 'Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.'

In his testimony in court the plaintiff testified to the effect that he was
I not informed of the grounds of his arrest and to consult a lawyer of his choice contrary to the first limb of art 5(3) of the Federal Constitution. As stated above, this issue of not being informed of the grounds of his arrest, was not raised in his statement of claim.

The federal counsel urged this court not to entertain this issue by reason of the fact that it was not pleaded in the statement of claim. A

It is trite law that the function of pleadings is to give fair notice of the case which is to be made so that the opposing party may direct his evidence to the issue disclosed by them. The fact that this was not raised as an issue means that the defendant was not put to notice of this issue and therefore denied the opportunity of directing their mind as to the evidence to meet this issue. B

I am of the considered opinion that the raising of this issue is clearly an afterthought and that the court should not entertain this issue by reason of it not being pleaded.

Further and in the alternative, even if this court were to consider this issue, the record shows that the plaintiff's own testimony in court does not support this contention. From the admitted facts and evidence enumerated in the first part of this judgment, it is clear beyond doubt that prior to being placed under arrest by the first defendant, the first defendant had informed the plaintiff of the grounds of his arrest and that he had had full knowledge of the accusation leveled against him. C D

The plaintiff in his testimony in court very clearly testified that prior to being placed under arrest:

(a) the first defendant had accused him of assaulting DW1 and of robbing DW1 of a sum of RM14 from him; E

(b) to overhearing the telephone conversation between the first defendant and his superior officer following from the accusation made by the first defendant against him and to the fact that the superior officer had authorized the first defendant to arrest him;

(c) to the fact that he then protested to the intended action of the first defendant to place him under arrest; and F

(d) he maintained his innocence to the acts complained against him.

In these circumstances the plaintiff's claim that he was not informed and did not know of the grounds of his arrest is clearly contrary to his own evidence. G

The result of this finding is that the plaintiff's claim that he was not informed of the grounds of his arrest, fails.

Whether the detention of the plaintiff was lawful?

The arrest for the purpose of using the period of detention to dispel or confirm the reasonable suspicion by questioning the suspect or seeking further evidence with his assistance is well established as one of the primary purpose upon detention. H

Article 5(4) of the Federal Constitution provides that 'Where a person is arrested and not released he shall without unreasonable delay, and in any case within twenty-four hours (excluding the time of any necessary journey) be produced before a magistrate and shall not be further detained in custody without the magistrate's authority...'. I

Section 28 Criminal Procedure Code makes the same provision. It reads:

> (i) A police officer making an arrest without a warrant shall without unnecessary delay and subject to the provisions herein as to bail or previous release take or send the person arrested before a Magistrate's Court.
>
> (ii) No police officer shall detain in custody a person arrested without a warrant for a longer period than under all the circumstances of the case is reasonable.
>
> (iii) Such period shall not in the absence of or after the expiry of a special order of a Magistrate under s 117 exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.

What happens when the police cannot complete his investigations within the twenty-four hours fixed by s 28 and wishes to further detain the arrested person? He could act under s 117 which reads:

> (1) Whenever any person is arrested and detained in custody and it appears that the investigations cannot be completed within the period of twenty-four hours fixed by s 28 and there are grounds for believing that the accusation or information is well founded the police officer making the investigation shall forthwith transmit to the Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case and shall at the same time produce the accused before the Magistrate.
>
> (2) The Magistrate before whom an accused is produced under this section may, whether he has or has not jurisdiction to try the case, from time to time authorise the detention of the accused in such custody as such Magistrate thinks fit for a term not exceeding fifteen days in the whole. ...
>
> (3) A Magistrate authorising under this section detention in the custody of the police shall record his reasons for doing so.

On the facts of this case it is not in issue that the plaintiff was arrested on the 21 March 1987 which is a Saturday. The 22 March 1987, being a Sunday, is an excluded day. The plaintiff was produced before the Magistrate on Monday 23 March 1987 at about 10.30 am where the application for a remand order under s 117 of the Code was made by the first defendant, which was granted by the Magistrate for a period of two days from 23 March 1987 to 25 March 1987.

As to the second remand order under s 117 of the Code granted by the President Sessions Court on 25 March 1987, it is in evidence that that decision was the subject of criminal revision by the Honourable Edgar Joseph Jr J where the Honourable Judge had ruled in the plaintiff's favour as reported in *Saul Hamid v PP* [1987] 2 MLJ 736.

Be that as it may I am of the considered opinion that even if this court were to accept this ruling that the plaintiff had a right to be represented by counsel in remand proceedings, it does not necessarily follow as a matter of course that an action will lie against the police officer who acted on the order of remand made by the Sessions Court President for the following two reasons.

In the first place, the President Sessions Court is immune from civil proceedings by reason of s 107 (1) Subordinate Courts Act 1948. See *Chong Fook Kam & Anor v Shaaban & Ors* [1968] 2 MLJ 50 at p 52 where it was held:

> ... that an order of a Magistrate authorising the detention of the arrested person beyond the period of 24 hours made under s 117 is a judicial act and cannot found a claim for damages against the magistrate.

Nor may such an order found a claim for damages against the police by reason of the immunity conferred upon them by s 32(1) of the Police Act 1967 which reads as follows:

> (1) Where the defence to any suit instituted against a police officer ..is that the act complained of was done in obedience to a warrant purporting to be issued by any competent authority, the court shall, upon production of the warrant containing the signature of such authority and upon proof that the act complained of was done in obedience to such warrant enter judgment in favour of such police officer...

Applying these statutory provisions to the facts of this case, as it is not in issue that the detention of the plaintiff from 23 March 1987 to 29 March 1987 by the police pending investigations was clearly in obedience of two orders issued by two judicial officers which are valid on the face of it, I therefore hold that the remand subsequent to the order of the judicial officer was the action of the Magistrate/Sessions Court President for which the first defendant cannot be held responsible for false imprisonment. In these circumstance the claim of the plaintiff that he was unlawfully detained from 25 March 1987 to 29 March 1987 is clearly unsustainable in law.

Whether the police were in breach of their statutory duty to investigate and/or negligent in carrying out their statutory duty?

On this issue the plaintiff must show on a balance of probabilities, in fact and as a matter of law, that the police were in breach and/or negligent in carrying out their statutory duty to investigate. The breach of statutory duty alleged in this case consists of an omission to investigate the report lodged by him.

The actions taken by the police subsequent to receipt of Reports No 641/87 and 642/87 (which substantially are not in issue) are self explanatory and has already been emunerated in great detail in the first part of this judgment.

The first defendant in his evidence testified that the investigations into the reports lodged by DW1 and the plaintiff were concurrent as they relate to the same incident. It is also in evidence that the first defendant had not acted unilaterally in this case but had consulted his superior officer, the Head of the Criminal Investigation of the District as to the action to be taken immediately after the statements of DW1 and the plaintiff had been recorded.

What transpired at the remand proceedings has already been dealt with at great length. During the period the plaintiff was under remand pending

investigations the first defendant further questioned the plaintiff. According to the first defendant the plaintiff did not cooperate. The first defendant had also traced the earlier police reports lodged by the plaintiff. Upon completion of his investigations the police came to the conclusion that there were sufficient evidence to charge the plaintiff under ss 392 and 323 of the Penal Code. The police then referred the investigation papers to the Deputy Public Prosecutor ('the DPP') and the DPP then made the decision to charge the plaintiff.

In the light of all of the actions taken by the police as set out above I am of the considered opinion that the contention of the plaintiff that the first defendant had failed and/or neglected to carry out his statutory duty to investigate is unwarranted and unsubstantiated .

Whether the plaintiff's right of access to counsel infringed?

I would now like to consider the alleged infringement of the right to access to counsel contrary to the second limb of art 5(3) of the Federal Constitution.

First and foremost it is pertinent to note that the Constitution does not prescribe the time within which an arrested person shall be allowed to consult counsel.

As to the decision of YA Edgar Joseph Jr in the Criminal Revision No 58–8–87 as reported in *Saul Hamid v PP* [1987] 2 MLJ 736, I have scrutinized it closely and am of the view that the decision is not an authority in relation to the right to access to counsel. The specific issue for determination in that earlier criminal application, in the words of the learned judge was, 'Has an arrested person the right to be represented by a legal practitioner in remand proceedings under s 117 of the Criminal Procedure Code?' On this issue the learned judge held that an arrested person had the right to be represented by counsel in remand proceedings under s 117 of the Code before a judicial officer.

However, on the issue of the right to access to counsel conferred by the second limb of art 5(3) Edgar Joseph Jr J (as he was then) in his judgment states that:

> As to the right to consult Counsel, it would appear at first glance that this is a right which is unqualified since it is difficult to conceive of a right which one cannot exercise. However there is high authority to the contrary.

His Lordship in his judgement then referred to the Federal Court decision in *Ooi Ah Phua v Officer-in-Charge Criminal Investigations, Kedah/Perlis* [1975] 2 MLJ 198.

Likewise, I am of the view that this court is bound to follow the law as set by the Federal Court in *Ooi Ah Phua.* In that case, the plaintiff was arrested by the police on 26 December 1974, and after being produced before the magistrate on 28 December 1974, was formally charged on 7 January 1975. The applicant's father instructed counsel on Monday 30 December 1974 and counsel was denied access on the ground that investigations were still in progress.

At p 200 of the judgment in *Ooi Ah Phua*, Suffian LP held as follows: A

> ... that the right of an arrested person to consult his lawyer begins from the moment of arrest, but I am of the opinion that that right cannot be exercised immediately after arrest. A balance has to be struck between the right of the arrested person to consult his lawyer on the one hand and on the other the duty of the police to protect the public from wrongdoers by apprehending them and collecting whatever evidence exists against them. The interest of justice is as important as the interest of arrested persons and it is well known that criminal elements are deterred most of all by certainty of detection, arrest, and punishment. B

Thus, on the facts of this case, I hold that the police were entitled to deny the plaintiff access to his counsel pending further investigations. That such C a denial of access during the period when he was under remand pending investigations does not amount to an infringement of the right to access to counsel conferred by the Constitution.

Whether the institution of criminal proceedings vitiated by malice? D

The ordinary meaning of the word 'malicious' is 'ill-will'. The legal meaning is that the act was done intentionally without just cause or excuse. In respect of the claim of the plaintiff for malicious prosecution, the question that needs to be answered is whether the prosecution was brought without reasonable and probable cause. E

The decision that I make on this issue must necessarily be consistent with my earlier findings of fact ie that the first defendant had acted with good cause and excuse arising from the accusation made by DW1 in arresting the plaintiff; that I accept DW1's version of events on the 21 March 1987 rather than the plaintiff's version of events. F

I have also no reason to doubt that the decision to prosecute the plaintiff made by the DPP, upon perusal of the investigation papers submitted to him by the police, was made bona fide in the honest belief and full conviction of the guilt of the plaintiff. I am satisfied that, applying the objective test, an ordinary and prudent man would come to the same conclusion as all officers in this case did. G

On the evidence before me, if at all any person harbored any ill-feeling or any animosity against any body it was the plaintiff and no other person. The plaintiff appears to be a very bitter man and spoke out emotionally against the persons named in his police reports who had singled him out as a target for harassment. He clearly has had a long history of interaction with H the police over the reports he had lodged over the years and also radiated a sense of bitterness against the police in general not only in respect of this case but probably also for not acting effectively against these persons who harassed him. Also very evident is his feeling of hatred against peanut vendors generally as the activities of some of them had, according to him, affected the image of the place he was serving. I

On the other hand there was no evidence at all of any animosity between or emnity between the plaintiff and the first defendant. Neither was

A it suggested that there was a special relationship between the first defendant and DW1 such that the first defendant was biased in DW1's favour. On the facts of this case, both DW1 and the plaintiff lodged their reports as an ordinary member of the public and there appears to be no reason why the first defendant and the DPP should favour DW1 and discriminate the plaintiff.

B In these circumstances, I find this allegation of malicious prosecution not proven. On the contrary I hold that there was reasonable and probable cause for instituting the proceedings and prosecuting the plaintiff as there was good reason to believe that the plaintiff had committed the acts alleged against him.

C *Allegation of assault*

The plaintiff also did not plead this issue in his statement of claim.

Having regard to the conduct and actions taken by the plaintiff I am of the view that if in fact the plaintiff had been assaulted by the police as alleged D by him in his oral testimony in court, it would be extremely unlikely that he would not have raised it very much earlier. The raising of this as an issue is clearly an afterthought and should therefore not be entertained by this court.

To conclude on the issue of liability, for the reasons adumberated E above, I hold that on all of the issues raised by the plaintiff he has failed to discharge the onus upon him.

QUANTUM

Should I be considered wrong in my finding on the issue of liability I now F proceed to set out my views on the plaintiff's claim as to damages.

The record shows that other than the fact that the plaintiff was working at the Botanical Gardens as a technician no other evidence was presented before the court to support his claim as to the amount of damages that this court should award to him should the court make a ruling on liability in his favour. G

In *Devaki Nair & Anor v Sum Kum* [1964] MLJ 74, Thompson LP quoted with approval a statement by Lord Goddard in *Bonham-Carter v Hyde Park Hotel Ltd* [1948] WN 89. The head note summarizes the ratio decidendi as follows:

H > In an action for damages it is for the plaintiff to prove his damages, it is not enough to write down the particulars and throw them at the head of the court saying, 'This is what I have lost, I ask you to give me these Damages'. He has to prove it.

In this case the plaintiff in his statement of claim alleged to having suffered 'mental distress, humiliation, and injury' and 'loss of promotion I opportunities' arising from the criminal charges preferred but has not given any particulars neither was any evidence led nor any document produced in support of his claim as to damages. On this issue the court also notes that

there is no agreement between the parties that the issue of quantum be assessed subsequently dependant upon the court's decision on liability.

I hold that the failure on the part of the plaintiff to lead evidence or produce documents to determine quantum allegedly due to him is fatal to the plaintiff's case. At the end of trial as there was no evidence to support the plaintiff's claim as to damages I hold that the plaintiff has therefore not discharged the onus on him and accordingly not entitled to any.

In the light of my findings the plaintiff's case is accordingly dismissed with costs.

Plaintiff's claim dismissed.

Reported by Andrew Christopher Simon